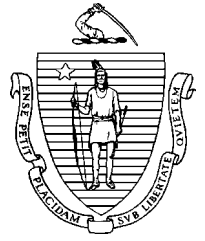




Commonwealth of Massachusetts State Ethics Commission

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phone: 617-727-0060, fax: 617-723-5851



CONFLICT OF INTEREST OPINION EC-COI-94-3

FACTS:

You serve as the Building Commissioner/Inspector of Buildings in a Town ("Town"). You are certified by the State Board of Building Regulations and Standards ("BBRS") as a "building inspector/building commissioner". This certification is now required for all municipal inspectors/building commissioners and is only available to individuals serving in such municipal positions.

You intend to start a private business in which you would conduct private inspections in connection with the purchase and sale of real estate. You state that your business would not involve construction, remodeling or other work subject to inspection by you as the Town's Building Inspector. Rather, you will inspect houses prior to their sale, relative to conditions such as wear and tear, pest infestation, leaks, etc. You tell us that your private inspection services will not relate to compliance with the Massachusetts State Building Code or any other code. You have provided us with a sample contract which you intend to use that specifically states that "[t]his report is not a compliance inspection or certification for past or present governmental codes or regulations of any kind." You believe that, in general, you are under no obligation to take any action in your municipal position, should you inadvertently come across a minor building or other code violation during the course of a private inspection, nor will you do so. There may, however, be certain more serious situations where you are legally required to act as the local inspector.

QUESTIONS:

1. May you use your status as a "Massachusetts Certified Inspector of Buildings" on business cards for your contemplated private business?
2. May you perform the proposed private inspectional services in connection with home sales in Town?

ANSWERS:

1. No.
2. No.

DISCUSSION:

In your position as the Town's Building Commissioner/Inspector, you are a municipal employee for purposes of the conflict of interest law.^{1/} Section 23 of G.L. c. 268A is relevant to your request.

1. Use of State Certification on Business Cards

You ask if you may use your status as a "Massachusetts Certified Inspector of Buildings" on your private business cards. The use of your certification will raise an issue under §23, which provides standards of conduct which are applicable to all public employees. Specifically, §23(b)(2) provides, in pertinent part, that no public employee may use his official position to secure unwarranted privileges of substantial value for himself or others.

Although you are not proposing to explicitly use your title as the Town's Building Commissioner/Inspector, we find that by virtue of your proposed business cards, you would nevertheless be using your public position to secure an unwarranted privilege of substantial value in violation of §23(b)(2). This is because, as you have explained, state certification as a building inspector/commissioner is only available to those individuals who serve as inspectors for municipalities. We therefore conclude that implicit in your use of the certification on your business cards is the use of your public position to assist you in a private business endeavor which has no relation to your public position or state certification. In other words, the use of your certification will likely provide you with unfair advantage over other providers of private inspectional services. Where such an advantage is derived from your public position and available solely to those who hold municipal inspectional positions (a fact which may or may not be known by your prospective private clients), we find that your use of the certification for private purposes would constitute use of your public position to obtain an unwarranted privilege in violation of §23(b)(2). See *EC-COI-92-28* (§23(b)(2) generally prohibits public employees from using official resources, including their titles, to promote a private interest); *84-127* (member of the judiciary may not lend the prestige of his judicial office to a corporate advertising campaign).

We also note that, pursuant to §23(b)(2), you may not use any Town resources or equipment to which you may have access for your private inspection work, nor may you engage in these private business activities during your Town work hours.

2. Performing Inspections in Town

You also ask whether you may perform the proposed private inspectional services in connection with home sales in Town. Section 23(b)(1) prohibits a municipal employee from accepting other employment involving compensation of substantial value,^{2/} the responsibilities of which are inherently incompatible with the responsibilities of his public office. This provision seeks to prevent the impairment of a public official's independence of judgment in the performance of his official duties which may result from certain types of simultaneous private employment. In 1985, the Commission found a violation of the conflict of interest law where a municipal police lieutenant simultaneously held a private job which overlapped with his official duties. In particular, where the police officer was privately employed as an assistant racetrack security chief and where the racetrack utilized municipal police services, the Commission found that the officer's private duties "necessarily impair[ed] the independence of his judgment in the performance of his official duties". See *In re DiPasquale*, 85 SEC 239;^{3/} see also *EC-COI-84-93* (attorney engaged in consulting work would be inherently impaired in the performance of his official duties); *91-14* (current member of the General Court could not conduct private seminars providing information on how to obtain advantages before or otherwise lobby the Legislature); *81-151* (state employee must be free to exercise independence of judgment and remain loyal solely to the Commonwealth).

You explain that your proposed inspectional services will be provided as part of a private real estate transaction and not in relation to the Massachusetts State Building Code or any other municipal code. Furthermore, you believe that, in general, you are under no obligation to take action in your municipal position, should you inadvertently come across a building code violation. You have acknowledged, however, that there may be certain situations where you are legally required to act as the local inspector. In particular, §6 of G.L. c. 143 requires that a local inspector, "upon being informed by report or otherwise that a building or other structure ... is dangerous to life or limb ... shall inspect same; and he shall forthwith in writing notify the owner ... to remove it or make it safe if it appears to him to be dangerous ... "

If, therefore, in the course of a private inspection, you were to become aware of a situation which would obligate you to take action as the Town's inspector pursuant to G.L. c. 143, §6, your loyalties would be divided, creating a situation where your private business activities would be inherently incompatible with your public duties as the Town's building inspector. In other words, under such a scenario, your independent judgment would be impaired by your private business relationship with a paying client. Because you cannot anticipate when you may come across a problem of the type covered by G.L. c. 143, §6, in order to avoid the potential for a violation of §23(b)(1), you must refrain from providing private inspectional services in connection with home sales in Town. See *Edgartown v. State Ethics Commission*, 391 Mass. 83, 89 (1984) (Legislature's concern

about conflicts between public duties and private interests “may reasonably have motivated it to prohibit involvements that might present potential for such conflicts”). We note that you are not, however, restricted from engaging in your private inspectional services in other municipalities.

DATE AUTHORIZED: February 25, 1994

^{1/} “Municipal employee”, a person performing services for or holding an office, position, employment or membership in a municipal agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent, or consultant basis, but excluding (1) elected members of a town meeting and (2) members of a charter commission established under Article LXXXIX of the Amendments to the Constitution. G.L. c. 268A, §1(g).

^{2/} The Commission has determined that anything valued at \$50 or more is “of substantial value”. *EC-COI-93-14*.

^{3/} We note that this case was decided pursuant to §23(&2)(1), a prior version of §23(b)(1). The principals embodied in, and the Commission’s interpretation of, the predecessor to §23(b)(1) are nevertheless relevant to our analysis here.